



February 20, 2015

FREEDOM OF INFORMATION ACT REQUEST
Via Email and Certified Mail

Regional Freedom of Information Officer
U.S. EPA, Region 9
75 Hawthorne Street (OPA-2)
San Francisco, CA 94105
(415) 947-4251
Via email: hq.foia@epa.gov

Re: FOIA Request Concerning Exempted Aquifers in California

Dear Freedom of Information Act Officer:

Please accept this request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), on behalf of the Center for Biological Diversity (“Center”). The Center is a national, nonprofit conservation organization with more than 825,000 members and online activists dedicated to protecting endangered species and wild places. Combining conservation biology with litigation, policy advocacy, media outreach and strategic vision, the Center is working to secure a future for animals and plants hovering on the brink of extinction and the wilderness they need to survive. The Center’s Climate Law Institute’s primary mission is to curb global warming and other air pollution, and to sharply limit its damaging effects on endangered species and their habitats, and on all of us who depend on clean air, a safe climate, and a healthy web of life.

A. Background

The Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et seq.*, defines aquifers meeting certain criteria as underground sources of drinking water. Underground sources of drinking water receive certain protections under the SDWA. The regulations made pursuant to the Safe Drinking Water Act provide that aquifers that meet certain criteria may be designated as exempted aquifers, as part of a State-controlled Underground Injection Control Program.¹ All designations of an exempted aquifer must be approved by the Administrator of the EPA as part of a UIC Program.² In March 1983, EPA approved the California Department of Oil and Gas Resources³

¹ 40 C.F.R. § 144.7(b).

² 40 C.F.R. § 144.7(b)(2).

³ As it then was. The agency is now known as the Department of Oil, Gas and Geothermal Resources, or DOGGR.

(DOGGR) application for primacy in the regulation of Class II injection wells under § 1425 of the Safe Drinking Water Act (SDWA). That is, it approved DOGGR's UIC Program. A Memorandum of Agreement (MOA) was entered into by the Regional Administrator of EPA and the DOGGR Supervisor in September 1982.⁴ This gave DOGGR primary responsibility and authority over all Class II injection wells in the State of California. The MOA purported to exempt a number of aquifers.⁵ Not all the exempted aquifers were identified by name in the Memorandum of Agreement. It is unknown whether, since September 1982, the Supervisor of California DOGGR has sought exemption of any additional aquifers. However, recent communication from DOGGR to the EPA has revealed that there is confusion or uncertainty over which aquifers in California have been finally approved as exempted.⁶

B. Document Request

Pursuant to FOIA and its implementing regulations, we request copies of the following documents and records generated, modified, or acquired by U.S. Environmental Protection Agency ("EPA"):

- (1) The most recent document prepared by Region IX that contains a complete list (or documents that together comprise a complete list) of aquifers (including the names of the zones and formations) located in California that have been designated as exempt by the EPA;
- (2) All documents and records generated, written or otherwise created since September 1983, that list or describe the exempted aquifers located in California, including, but not limited to:
 - (a) a December 13, 1982, Region IX memo forwarding to US EPA headquarters containing a version of the Memorandum of Agreement containing no significant exemption denials, described by Region IX as resolving "all known issues" with California's primacy application, and
 - (b) a May 17, 1985, letter from Frank Covington, US EPA's then-Director of the Water Management Division for Region IX that appears to confirm that US EPA did not deny any of the exemptions proposed by the Division in its primacy application;⁷

and

- (3) All documents and records prepared or received by the EPA since September 29, 1982, for the purpose of designating any aquifer in California as an exempted aquifer pursuant to 40 C.F.R. § 144.7(b).

The term "**documents and records**" means all forms of written or recorded matter, including correspondence, memoranda, records, e-mail, data sheets, reports, evaluations, summaries,

⁴ A MOA is required before a State may be granted primacy. See 40 C.F.R. § 145.25.

⁵ See Memorandum of Agreement, California Division of Oil and Gas Resources – EPA, Attachment 2 (Sept. 28, 1982).

⁶ Letter from Steve Bohlen, State Oil and Gas Supervisor, DOGGR, to Jane Diamond, Director, Water Division, EPA, 3 (Feb. 6, 2015) (on file with Center for Biological Diversity).

⁷ These documents are referred to in the letter from Steve Bohlen, State Oil and Gas Supervisor, DOGGR, to Jane Diamond, Director, Water Division, EPA, n1 (Feb. 6, 2015) (on file with Center for Biological Diversity).

opinions, journals, calendars, statistical records, notes, recordings of telephone calls, and other communications, including but not limited to, notes, memoranda and other writings of or relating to telephone conversations and conferences, minutes and notes of transcription of all meetings and other communications of any type, and any other information that is stored electronically, and that can be retrieved in printed, graphic, or audio form, including, but not limited to, information stored in the memory of a computer device, data stored on removable magnetic or optical media, e-mail, data used for electronic interchanges, digitized pictures and audio, and voice mail.

We request that, where possible, documents be provided electronically (on a CD, for example) to avoid copy expense and to further expedite our receipt of the materials. If the agency makes records available electronically, we request that the records be made available in their native format.

We request that priority be given to provision of the first document requested. We also request that responsive records be released as soon as they are available, but in no event later than 20 days as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send it immediately while EPA searches for other records.

C. Provision of Information Under the Freedom of Information Act

In 2007, Congress amended FOIA with the Openness Promotes Effectiveness in Our National (OPEN) Government Act of 2007. 5 U.S.C. § 552. In the Congressional findings to the OPEN Government Act, Congress found that “the American people firmly believe that our system of government must itself be governed by a presumption of openness.” 110 Pub. L. No. 175 § 2(2). In addition, Congress found that “disclosure, not secrecy, is the dominant objective of [FOIA].” *Id.* § 2(4) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352 (1976)). Thus, under FOIA, there is a “strong presumption in favor of disclosure.” *Id.* § 2(3) (quoting *Dep’t of State v. Ray*, 502 U.S. 164 (1991)).

In a March 19, 2009 memorandum to the heads of executive departments and agencies, Attorney General Eric Holder underscored that agencies should release records requested under FOIA even if the agency might have a technical excuse to withhold them:

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption. Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure.

Memorandum of Attorney General E. Holder (March 19, 2009).

D. Fee Waiver Request

We request that EPA waive all fees in connection with this matter. The Center meets the two-pronged test under FOIA for a fee-waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by EPA’s fee-waiver regulations at 40 C.F.R. § 2.107(1).

In considering this fee waiver request, it is imperative that EPA remember that FOIA carries a presumption of disclosure and was designed specifically to allow non-profit, public interest

groups like the Center access to government documents without the payment of fees. Both Congress and the case law make it clear that the fee waiver provision is intended to facilitate access to agency records by “watchdog” organizations, such as the Center, which use FOIA to monitor government activities. The waiver provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in a clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups.” *Better Gov’t Ass’n v. Department of State*, 780 F.2d 86, 94 (D.C. Cir. 1986), *quoting Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984). As stated by one Senator, “agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). The Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Id.*

I. The subject of the request concerns “the operations and activities of the government.”

The subject matter of this FOIA request relates directly to the operations and activities of the federal government. 5 U.S.C. § 552(a)(4)(iii). The requested documents and records pertain to EPA’s responsibilities and obligations to protect the nation and its citizens from the harmful effects of water pollution. It is clear that such management, as well as EPA’s overall implementation and execution of environmental laws, are specific and identifiable activities of an executive branch agency of the government *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (“‘[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted). The requested documents pertain the exemption of aquifers in California under the Safe Drinking Water Act and associated regulations. As the exercise of powers under the Safe Drinking Water Act is an identifiable task of EPA, there is no question that any decisions made or analyses or correspondence conducted by EPA in designating an exempted aquifer, or reviewing, maintaining or exercising powers in respect of an exempted aquifer, are a U.S. government operation. Thus the FOIA request plainly concerns the operations or activities of the government.

II. The disclosure is “likely to contribute” to an understanding of government operations or activities (the informative value of the information to be disclosed).

There is no question that the documents requested will contribute to an understanding of federal government operations. The documents requested are new and are not in the public domain. To the extent EPA has documents pertaining that list the exempted aquifers in California, these documents will undoubtedly provide meaningful understanding of EPA’s understanding of which aquifers have been formally designated as exempt. Documents relating to the designation process are certain to shed light on the EPA’s decision-making process and compliance with applicable law. In short, the requested documents will help reveal the basis for the decisions at issue.

The requested documents will provide important information regarding what EPA has done, is doing, or is capable of doing, in regard to protecting environmental quality and human health by

preventing pollution of underground sources of drinking water. Such knowledge will allow better understanding of government operations, in particular, what EPA knows, what EPA is or is not doing, what EPA could be doing, and what reasons EPA might have for taking or not taking certain actions in regard to the environmental and human health impacts that it oversees.

The requested documents will provide important information regarding EPA's exercise of its authority under the Safe Drinking Water Act to designate underground sources of drinking water as exempt aquifers. In particular, the requested records will convey information about how the designation process was undertaken, and which aquifers have been formally designated as exempt. Such knowledge will allow better understanding of government operations, and in particular, what EPA knows, what EPA is or is not doing, and what EPA could be doing, in regard to protection of underground sources of drinking water. Thus, production of the requested documents is "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

In *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1286, the court made clear that "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations...." In this instance, all the requested documents potentially provide new information about which aquifers in California have been designated as exempt, and under what circumstances. See *Western Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding."); see also *Community Legal Services v. HUD*, 405 F.Supp.2d 553 (D. Pa. 2005).

III. The disclosure of the requested information will contribute to "public understanding."

The information requested will contribute to public understanding of how EPA is discharging its duties under existing laws including the Safe Drinking Water Act to protect water quality and human health and welfare. The information requested will also provide the Center, Center members, and the public to which the Center disseminates information, with insight into the EPA's understanding of which aquifers in California have been designated exempt, and the process by which that exemption occurred. The requested documents are not currently in the public domain. Their release is not only "likely to contribute," but is in fact certain to contribute significantly to better public understanding of the operations of or activities of the government concerning the designation of underground sources of drinking water as exempted aquifers. 5 U.S.C. §552(a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

In *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1286, the court made clear that "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations" In this instance, the requested documents will likely provide new information about the process by which aquifers in California were designated as exempt, and which aquifers have been formally designated as exempt by the EPA. Such information is not currently in the public domain. See *Western Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("WWP asserted in its initial request that the information requested was

either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); *see also Community Legal Services v. HUD*, 405 F.Supp.2d 553 (D. Pa. 2005) (“[T]he CLS request would likely shed light on information that is new to the interested public.”).

Public understanding of the new information will be achieved because the Center intends to use the new information that it receives to educate the public by informing the public about which underground sources of drinking water have been designated as exempt, and when and how exempted aquifers were designated as such.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity.” *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA. In consistently granting the Center’s fee-waivers, agencies have recognized that the Center possesses the experience and expertise necessary to evaluate the requested information and provide it to the public in a useful form. For instance, the Center has several staff scientists and attorneys who have the ability to assess and digest the requested information, and the Center has the capacity to publish reports regarding that information. The Center’s informational publications supply information not only to its membership, but also to the memberships of most other conservation organizations, locally as well as nationally. In addition, our informational publications are disseminated to the media and are available on our website to the general public.

The Center provides information we receive from FOIA requests to the public in a variety of formats. Information such as that requested is regularly disseminated in e-mail newsletters and action alerts to more than 825,000 members and online activists, and in tweets to more than 30,000 followers on Twitter. Three times per year it sends a printed newsletter to more than 50,000 members. In addition, our publications supply information not only to our membership, but also to the memberships of many other conservation organizations, locally as well as nationally. Our publications also continue to contribute information to public media outlets. Information may be disseminated through any or all of these media. The courts have recognized that similar information distribution activities are likely to contribute to public understanding of government operations and activities. *See Forest Guardians v. Dep’t of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (“Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public’s understanding of the BLM’s operations and activities.”).

The Center has a particular interest in disseminating the requested documents to the public, and to increase the public's understanding of the agency's activities, because of its active and continuing interest in holding EPA accountable for complying with its statutory obligations, and in ensuring the integrity of government analyses and decision-making processes, in order to protect the public from water pollution. Release of the information will also empower members of Center, and members of the public, to engage in public advocacy efforts to protect and conserve California's underground sources of drinking water, and to more effectively evaluate the need for litigation or grassroots action.

IV. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

Public oversight and enhanced understanding of EPA duties is absolutely necessary. The Center's track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure is well established.

The requested information is certain to shed light on EPA oversight of the Underground Injection Control Program in California, and will also help show whether or not the EPA is acting properly, whether the EPA is complying with applicable law, and the possible effects of EPA's actions. The documents are new and are not in the public domain. The documents in question will, among other things, help reveal the process undertaken to designate underground sources of drinking water in California as exempt aquifers. Just as importantly, it will reveal what information the agency had in its possession when designating aquifers in California as exempt, and what aquifers it currently understands to have been formally exempted. The public's understanding of these matters, as compared to the level of public understanding existing prior to the disclosure, will be significantly enhanced by the dissemination of this information. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well established function of public oversight of agency action. The Center is not requesting these documents merely for their intrinsic informational value.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. As previously stated, information such as that presently requested is often disseminated through online alerts sent to more than 825,000 members and online activists; as well as tweeted to over 30,000 followers. Print publications are sent to more than 50,000 members. In addition, our informational publications supply information not only to our membership, but also to the memberships of many other conservation organizations, locally as well as nationally. Our informational publications also continue to contribute information to public media outlets. The Center has been

substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

V. Obtaining the information is of no commercial interest to the Center

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

E. Conclusion

I trust that this letter demonstrates to your satisfaction that the Center qualifies for a fee-waiver, and that you will promptly begin to collect the requested material. Please contact me if you have any questions, or if I can clarify this request in any way. I can be reached at 415-632-5321. We look forward to a reply within twenty working days, as required by the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A). Failure to respond in a timely manner shall be viewed as a denial of this request, and may result in our immediately filing an administrative appeal. Thank you in advance for your assistance.

Yours sincerely,

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